

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PRECOR INCORPORATED, a Delaware corporation; and LARRY D. MILLER, an individual,

Plaintiffs,

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FITNESS QUEST, INC., a Delaware corporation; and NEW BALANCE ATHLETIC SHOE, INC., a Massachusetts corporation,

Defendants.

Case No. C05-0993L

ORDER DENYING MOTION FOR LEAVE TO AMEND COMPLAINT

I. INTRODUCTION

This matter comes before the Court on “Plaintiffs’ Motion for Leave to File Second Amended Complaint.” (Dkt. #98). Plaintiffs seek leave under Federal Rule of Civil Procedure 15(a) to amend their complaint to add three additional allegedly infringing elliptical models produced by defendants: the Fitness Quest Edge 299e Elliptical Trainer, the Fitness Quest 1100HR/A Elliptical Trainer and the New Balance 5.5 Elliptical Trainer. Defendants argue that plaintiffs have failed to show good cause to justify an amendment to the complaint at this stage

1 in the litigation. For the reasons discussed below, the Court denies plaintiffs' motion for leave
 2 to amend.

3 **II. DISCUSSION**

4 Plaintiffs filed their infringement action on June 1, 2005. On September 16, 2005, the
 5 Court entered a scheduling order setting November 15, 2005 as the deadline for amending
 6 pleadings and indicating that “[b]y the time the Joint Claim Chart for each patent is filed, all
 7 allegations of infringement must be revealed and the Court will not consider new allegations of
 8 infringement without asserting party showing good cause.” Minute Order Setting Trial Date &
 9 Related Dates at p. 4 (Dkt. #12). The deadline for parties to submit the Joint Claim Chart was
 10 May 5, 2006. Plaintiffs filed this motion almost six months later.

11 In arguing for leave to amend, plaintiffs focus on the liberal amendment policy of Federal
 12 Rule of Civil Procedure 15(a). While it is true that there is a “strong policy in favor of allowing
 13 amendment” under Rule 15(a), Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994), that
 14 standard is not the applicable one here. Once a court has entered a pretrial scheduling order
 15 establishing a timetable for the amendment of pleadings, Federal Rule of Civil Procedure 16(b),
 16 not Rule 15(a), governs. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir.
 17 1992); see also Optivus Tech., Inc. v. Ion Beam Applications S.A., 469 F.3d 978, 992-93 (Fed.
 18 Cir. 2006). Under Rule 16(b), a plaintiff must show good cause for failing to amend the
 19 complaint before the deadline specified in the scheduling order. Id. Unlike Rule 15(a)’s more
 20 liberal standard that looks primarily to the bad faith of the moving party and the prejudice to the
 21 opposing party, “[t]his standard ‘primarily considers the diligence of the party seeking the
 22 amendment.’” Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000) (quoting
 23 Johnson, 975 F.2d at 609). While prejudice to the party opposing the modification might
 24 provide additional reasons for denying the motion, it is not required to deny a motion to amend
 25 under Rule 16(b)). Id. at 1295.

1 Plaintiffs argue that there is good cause to amend because the failure to identify the new
 2 devices prior to the submission of the Joint Claim Chart was due to defendants' "repeated failure
 3 to disclose all of its elliptical trainers" in response to plaintiffs' interrogatories. Reply at pp. 2-
 4. Plaintiffs argue that without such disclosures, "it is impossible to know the identity of all of
 5 Defendants' potentially infringing products from publicly available sources." Reply at 3.

6 The Court cannot attribute plaintiffs' failure to amend its complaint in a timely fashion to
 7 either defendants' interrogatory responses or the difficulty of identifying defendants' potentially
 8 infringing products from publicly available sources. It is beyond dispute that plaintiffs were
 9 aware, or should have been aware, of the existence of all the models they now seek to add to
 10 their complaint well before the May 5, 2006 deadline. Defendants specifically identified all of
 11 the devices in question in a December 5, 2005 declaration in support of their opposition to
 12 plaintiffs' motion for a preliminary injunction:

13 8. Fitness Quest currently markets and sells a number of rear drive and
 14 front drive elliptical trainers, most of which are not alleged to infringe U.S.
 15 Patent No. 5,383,829 ("the '829 patent"). For example, the ***ECLIPSE***
TRAINER® 1100HR elliptical trainer, the ***ECLIPSE TRAINER®***
1100HRA elliptical trainer, and the ***EDGE® 299e*** elliptical trainer are all
 16 rear drive elliptical trainers (see Exhibits A, B, C) that are not charged as
 17 infringements by plaintiffs Precor Incorporated ("Precor") and Larry D.
 18 Miller ("Miller")

19 14. The NEW BALANCE elliptical trainers being promoted and sold are
 20 both rear drive and front drive units. The front drive units, the NEW
 21 BALANCE® 9.0e, 9.5e and 950 (see Exhibits F, G, H), are made and sold
 22 under a license from Robert E. Rodgers, Jr. under U.S. Patent No.
 23 5,938,567. Plaintiffs Precor and Miller do not allege that these front drive
 24 unites are infringements of the '829 patent. Similarly, plaintiffs Precor and
 25 Miller do not allege infringement of a rear drive unit, namely the ***NEW***
BALANCE® 5.5 (See Exhibit I).

26 Declaration of Michael Clark in Support of Opposition to Plaintiffs' Motion for Preliminary
 27 Injunction at ¶¶ 8, 14 (Dkt. #46) ("Clark Decl.") (emphasis added). As exhibits to the
 28 declaration, defendants also provided hard copies of the Internet pages where these devices were
 29

1 offered for sale.¹ Clark Decl. at Exs. A-C, I. The Court then specifically referenced all of the
 2 devices, with the exception of the New Balance 5.5 Elliptical Trainer, in its February 2, 2006
 3 Order:

4 This assertion is undermined by the reality of Fitness Quest's product line,
 5 which features several elliptical machines not subject to the instant motion
 6 or suit, and apparently not infringing the patent. For example, Fitness
 7 Quest sells the Eclipse 1100HR Elliptical Trainer (for \$399.99), Eclipse
 8 1100HRA Elliptical Trainer (for \$449.99), and the Edge 299e Elliptical
 9 Trainer (for \$299.99).

10 Order on Motion for Preliminary Injunction at p. 8 (Dkt. #60).

11 If plaintiffs were interested in investigating the existence of potentially infringing devices
 12 other than those specifically identified in their original complaint, they need not have looked too
 13 far to find the devices now in question. Even if they had not thought to look on defendants'
 14 website, they would have discovered the existence of these devices by reading either defendants'
 15 opposition to their motion for a preliminary injunction or the Court's February 2, 2006 Order.
 16 In fact, without any assistance or guidance from defendants, plaintiffs eventually located and
 17 purchased these devices from defendants' website, but sought to do so only after the Court's
 18 Markman Order was issued. In other words, the evidence makes it clear that plaintiffs were not
 19 dependent on defendants in locating these devices in a timely fashion. If plaintiff had
 20 investigated their claims in a timely fashion they would have been able to amend their complaint
 21 well before the May 5, 2006 deadline. "[C]arelessness is not compatible with a finding of
 22 diligence and offers no reason for a grant of relief." Johnson, 975 F.2d at 609. Plaintiffs'
 23 failure to establish the required diligence ends the Courts inquiry.² See Coleman, 232 F.3d at

24 ¹ The Court was recently able to access the same Internet pages using the addresses contained in
 25 the footer of these documents.

26 ² Though a finding of prejudice is not required under Rule 16(b), the Court notes that the
 27 prejudice that would result from allowing plaintiff to add three new allegedly infringing models at this late
 28 stage of discovery, after the issuance of the Court's Markman Opinion, also weighs in favor of denying
 29 plaintiffs' motion. See Coleman, 232 F.3d at 1295

1 1295.

2 **III. CONCLUSION**

3 For all the foregoing reasons, plaintiffs' motion for leave to file a second amended
4 complaint is DENIED. (Dkt. #98).

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6 DATED this 12th day of January, 2007.

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10 Robert S. Lasnik
11 United States District Judge